No. 16385

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND,

*Appellant,*

*vs.*

FAYE LYONS,

*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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### I.

### Appellee Is Deemed to Have Admitted That the District Court Had Jurisdiction of the Case and This Honorable Court Has Jurisdiction of the Subject Matter of This Appeal.

Under sub-paragraphs 1 and 2 of topic "A" of Appellant's Opening Brief, appellant cited authority in support of jurisdiction. Appellee has not contended nor cited authority to the contrary, and thus may be deemed to have conceded these points.

### II.

### Appellee's Contention That the Motion for New Trial Was Granted on Grounds Stated in the Motion Is Contrary to a Reasonable Interpretation of the Order.

Appellee's major contention appears to be that the Trial Judge granted a new trial as to the second cause of action without specification of any particular ground therefor, and thereby relied on the grounds raised in appellee's

motion, *e. g.,* insufficiency of the evidence to support certain findings.

However, a reasonable interpretation of the order granting the new trial shows that this contention is erroneous. At the outset it should be noted that, where the order is made upon a ground stated in the motion, the Trial Judge is not required to specify the basis for the order since the grounds are fully set forth in the motion.

> *Federal Rules of Civil Procedure,* Rule 59;
> *Fine v. Paramount Pictures,* 181 F. 2d 300;
> *Freid v. McGrath,* 133 F. 2d 350.

But where the basis for the order does not appear in the motion, the Court is obliged to set forth the ground relied upon.

> *Federal Rules of Civil Procedure,* Rule 59(d).

Thus, appellee's major contention presupposes that the Trial Judge performed an idle act in repeating a ground already fully set forth in the motion. This would defy logic and reason.

Here, the Trial Judge set forth the basic statute involved (*Cal. Civ. Code,* Sec. 47, Subd. 2(3)) together with specific page references to *Davis v. Hearst,* 160 Cal. 143 and *Tingley v. Times-Mirror Co.,* 151 Cal. 1. Neither of these cases involved a question of sufficiency of the evidence. On the contrary, both cases resolve questions as to admissibility of evidence at the pages cited by the Trial Judge.

Thus, appellee's major contention would assume that the Trial Court cited page references to two cases which were not applicable to the ground relied upon for the order. This theory does an injustice to the Trial Judge.

Appellant contends that the Trial Court felt that error had been committed in the introduction of evidence on the second cause of action, and purported to remedy this error by ordering a new trial. (It should be noted that appellant does not believe there was error in the receipt of evidence, even though it does not appear essential to decide this question at this point). This the Court had full authority to do, so long us it acted within the 10-day period required under the rules. Upon expiration of the time allowed, this ground was no longer available as a basis for granting a new trial.

There is no reason why a Trial Court may not set forth the basis for its ruling by reference to reported cases and statutes. In fact, appellant believes this is a common method of directing counsel's attention to the legal points relied upon. Thus, in the present case, the only logical and consistent interpretation of the Trial Court's order would be that the Court specified a ground not stated in appellee's motion for a new trial.

Appellee further contends (Appellee's Reply Brief, pp. 4-5) that the case of *Davis v. Hearst, supra,* involved the following two points:

1. In the absence of a plea in mitigation, evidence of truth is properly excluded; and
2. When a plea of mitigation is made, only so much of the truth as the defendant knew at that time can avail him.

Appellee dismisses the first point by stating that *Davis v. Hearst* lacked a plea in mitigation, while in the present case privilege was pleaded. However, a plea of mitigation was made in *Davis v. Hearst.* At page 154 of that case, it is shown that the answer alleged facts in mitigation in that Mr. Hearst was absent from the city at the time

of the publication and that he employed careful and skilled men to run the newspaper in his absence. It is clear that the type of mitigation present in that case is quite different from the privilege raised in the present case. In the *Davis v. Hearst* case, the facts alleged going to mitigation had no relation to the truth of the charges while, in the present case, the evidence going to privilege may have tended to prove the truth. However, the issue of the propriety of admitting evidence going to the truth of the defamation, where facts in mitigation are pleaded, was squarely before the Court in *Davis v. Hearst, supra.*

Appellee fails to mention the case of *Tingley v. Times-Mirror, supra,* also cited by the Court in the order granting a new trial. In that case, the Court excluded evidence going to the issue of truth and privilege. The Court held that no plea had been made that the defamation was true, so the evidence was properly excluded as to that issue. Further, it held that the facts pleaded were insufficient, as a matter of law, to constitute a plea in mitigation. Hence, the evidence offered was inadmissible on either issue since neither defense had been properly raised. Thus, the issue of error in exclusion of evidence was necessary to the decision in *Tingley v. Times-Mirror, supra.* Hence, it follows that the Trial Judge must have cited this case for his position that evidence of truth had been improperly received.

Appellee also urges that the Trial Court "may well" have felt he erred in considering all evidence produced at the trial, although only so much as was known to appellant was available for consideration on the second cause of action. Of course, even where objected to, the admission of irrelevant or immaterial evidence normally will not be grounds for a reversal where the case is

tried by the Court. (*White v. White,* 82 Cal. 427, 452 (1890).) The Trial Judge is presumed to have considered only relevant and material evidence. Thus, the error the Court must have considered, if appellee's point is well taken, is that evidence was erroneously admitted on the second cause of action. This, of course, is one of appellant's principal contentions.

## III.

## Appellee's Contentions That Malice Was Proved and a Finding of Falsity Was Required Are Not Supported by the Record.

Appellee claims (Appellee's Reply Brief, p. 9, Point 3) that there was ample evidence to support a finding of malice as used in *Civil Code,* Sec. 47, Subd. 2 (3). Clearly, the only *direct* evidence of malice was the testimony of appellant set forth at page 45 of Appellant's Opening Brief. This evidence directly negatives the existence of express malice required by the law of privilege.

Certainly this evidence may be overcome by indirect evidence going to appellant's state of mind. However, if the indirect evidence in the record is insufficient, as a matter of law, to show the existence of express malice, the Court is left with the uncontradicted direct evidence of lack of express malice. That is the state of the record here. Appellee's claim that express malice was shown is in error.

In addition to a journey through ancient literature, appellee has set forth the evidence which allegedly controverts appellant's direct evidence (Appellee's Reply Brief pp. 11-13). Appellant will show that the evidence cited by appellee, which is in the record, is entirely insufficient, as a matter of law, to prove express malice.

1. It is claimed (Appellee's Reply Brief, p. 11) that appellant "swore to the truth of accusations of adultery with particularity as to time and place on the sole evidentiary basis of the Blanch Lampert Statement." On the contrary, appellant executed the cross-complaint on the basis of the evidence set forth at pages 46-48 of Appellant's Opening Brief. There was a great deal of evidence besides the Lampert Statement within appellant's knowledge at that time, and it was found that she had reasonable and probable cause for her belief.

2. Appellee claims (Appellee's Reply Brief, p. 11) that appellant made no effort to serve appellee "although she knew her address." Nowhere in the record does it appear that appellant knew appellee's address at that time. In fact, appellant testified that she did not know appellee at all.

3. Appellee claims (Appellee's Reply Brief, pp. 11-12) that no attempt was made to obtain substituted service. This, of course, is true.

4. It is urged (Appellee's Reply Brief, p. 12) that appellant made no attempt to prove adultery at the trial. This is not correct. This issue was fully tried and contested under all three causes of action. Under the second cause of action, appellant did not plead truth as a special defense, and it would have been improper to present evidence of the truth if objected to. It was not objected to. Appellee specifically offered evidence on this issue at the trial.

5. It is claimed (Appellee's Reply Brief, p. 12) that appellant scoured the nation to find phases of appellee's life to find justification for the alleged libel. Appellant has searched the record in vain for any such evidence. None was found since no such evidence was produced by either party.

6. Appellee says (Appellee's Reply Brief, p. 12) that appellant admitted the alleged defamation was false by omitting a plea of truth. Again appellee declines to recognize the existence of *Snively v. Record Pub. Co.,* 185 Cal. 565, which holds that it is not required that truth be shown or even considered in order to prove the existence of privilege. If the defense of privilege is established, the truth or falsity of the libel is immaterial.

7. It is claimed (Appellee's Reply Brief, p. 12) that appellant's remarks at the time of taking the Lampert Statement constitute evidence of express malice. At two points during the taking of this statement, appellant interjected remarks. Neither of these remarks has any inference or hint of a malicious state of mind toward appellee or, for that matter, against anyone else. Appellee was not even under discussion by Mrs. Lampert at that point. These remarks have no evidentiary value whatsoever on the issue of appellant's state of mind toward appellee.

8. Appellee next makes the extraordinary claim (Appellee's Reply Brief, p. 12) that, by resisting the claim for damages, appellant has evidenced an ill-will toward appellee. It will truly be a sad day for jurisprudence if the defense of a lawsuit becomes evidence of malice, which is in issue in the very same litigation.

9. Appellee further asserts (Appellee's Reply Brief, pp. 12 and 13) that the present appeal taken by appellant is proof of her malice. It should suffice to remark that this theory is without support of either logic or law.

It thus appears that appellee's alleged indirect evidence of express malice is either outside of the present record or an assumed inference from facts which do not have any evidentiary weight as to appellant's state of mind. In

short, the evidence relied on by appellee is entirely insufficient, as a matter of law, to show malice. Hence, appellant's direct evidence of her lack of malice stands alone and requires a finding in accordnace therewith.

Appellee's final point (Appellee's Reply Brief, p. 15) is that "A Finding of Falsity was Essential." Nowhere does appellee discuss or refer to *Snively v. Record Pub. Co., supra*, which holds directly contrary to appellee's position, *e. g.,* that it is not necessary to allege and prove the truth of the charge in order to show the defense of privilege; otherwise, the defense of privilege would be renendered useless. Even though appellee chooses to ignore this case, appellant submits it represents the law on this matter and should be followed by this Court.

## Conclusion.

Appellant submits: [1] the District Court had no jurisdiction to grant the motion for new trial on the ground specified; [2] if it did have jurisdiction to grant said motion on the ground stated, it was a gross and prejudicial abuse of discretion; and [3] if the Court granted the motion on the ground of insufficiency of evidence to support the finding of privilege [Finding VII], it was a gross abuse of discretion as there was a great preponderance of evidence to support the finding as a matter of law.

Therefore, the order granting the motion for new trial must be reversed and the judgment reinstated.

Respectfully submitted,

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